1991

Nay v. General Motors : Brief of Appellee

Utah Supreme Court

Stephen G. Morgan; attorney for appellants.
H. James Clegg; Rodney R. Parker; attorneys for appellee.

IN THE UTAH SUPREME COURT

LEEANN NAY, individually and as personal representative for MATTHEW and MERISSA NAY, the heirs of ROBERT NAY; and VIRGINIA NAY, individually and as personal representative for CONNIE WHEELER, CAROLYN GALLEGHER, JOAN NAY and JALYNN NAY, the heirs of WAYNE NAY,

Plaintiffs/Appellants

vs.

GENERAL MOTORS CORPORATION,

Defendant/Appellee

No. 910244
No. 910273
No. 910365

Argument Priority 16

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court of
Salt Lake County, Honorable Richard H. Moffat, District Judge

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LIST OF ALL PARTIES TO PROCEEDING

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MERISSA NAY
ROBERT NAY
VIRGINIA NAY
CONNIE WHEELER
CAROLYN GALLEGHER
JOAN NAY
JALYNN NAY
WAYNE NAY

GENERAL MOTORS CORPORATION
RON GREEN CHEVROLET PONTIAC GMC, INC. (dismissed by stipulation at the beginning of trial)

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IN THE UTAH SUPREME COURT

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vs.

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Defendant/Appellee

No. 910244
No. 910273
No. 910365

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the District Court in a civil case. The Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting appellee's motion for directed verdict?

In reviewing a directed verdict, the court "must examine the evidence in the light most favorable to the losing party." Management Committee of Graystone Pines Homeowners Association v. Gray-

stone Pines, Inc., 652 P.2d 896, 898 (Utah 1982). A directed verdict or a judgment notwithstanding the verdict is appropriate in a case whenever the party against whom the motion is asserted has failed to offer substantial evidence in support of any element of its claim upon which it bears the burden of proof. Taylor v. Keith O'Brien, Inc., 537 P.2d 1022 (Utah 1975).

2. The trial court concluded that a 1973 recall of passenger cars did not involve a substantially similar design to that of the pickup truck involved in this accident and was therefore irrelevant, and that the potential prejudicial effect of the evidence outweighed any possible probative value. (R. 290-92.) Did the trial court abuse its discretion in excluding evidence of the recall on that basis?

The admissibility of evidence is a question of law committed to the sound discretion of the trial court. Rule 104(a), Utah Rules of Evidence. The court's ruling may be reversed only if that discretion was abused, State v. Bartley, 784 P.2d 1231, 1237 (Utah App. 1989), and then only if admission of the evidence would have had a substantial likelihood of bringing about a different result. Hill v. Hartog, 658 P.2d 1206, 1208 (Utah 1983).

3. Did the trial court err in requiring plaintiffs to order and pay for transcripts of the cross-examination of their expert witnesses, and transcripts of other evidence relevant to the issues they raise on appeal, for inclusion in the record on appeal?

There is no Utah law establishing the standard of review for this issue, but General Motors believes that the trial court is in the best position to evaluate the content and importance of trial evidence, and thus that the standard of review should be abuse of discretion.

DETERMINATIVE STATUTORY PROVISIONS

Rule 403, Utah Rules of Evidence:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 11(e)(2), Utah Rules of Appellate Procedure:

> **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

STATEMENT OF THE CASE

Nature of the Case

This is a products liability action. Plaintiffs claim damages for personal injuries and wrongful death arising out of a single vehicle accident involving a 1986 GMC High Sierra pickup truck. (R. 129-141.)

Course of Proceedings Below

The case was tried to a jury on October 1 through 11, 1990. (R. 383, 389-90, 415-18.) After deliberating for several hours, the jury reported back to the court that they were deadlocked in a 4 to 4 tie on the first question (liability). (R. 420, 674-75.) The court gave an appropriate instruction and the jury returned to deliberate further. (R. 674-75.) After a short time, they again reported deadlock. (Id.) Rather than discharging the jury, the court, in effect, directed the jury to return a verdict for defendant because a verdict against the party having the burden of proof on liability issues could be entered with fewer than six jurors answering no. (Id.) The jury returned a verdict against plaintiffs on the liability issues. (R. 421-25.) The jury was polled and four of the eight jurors concurred in the verdict. (R. 678.)

In the process of ruling on post-trial motions, the court reversed its position, declaring the verdict defective. After some initial misunderstanding (R. 731-40), the court denied plaintiffs' motion for new trial and granted defendant's motion for directed verdict. (R. 744-45.) Plaintiffs appealed. (R. 747-50.) As required by Rule 24(f), copies of the court's Minute Entry (R. 739-40) and Order (R. 744-45) are attached at Tabs A and B of this brief.

Statement of Facts

Plaintiffs' statement of facts recites their contentions with

respect to the facts surrounding the accident, but omits the evidence on the critical issue of causation. They also make two misstatements of fact which require correction. First, they state that the vehicle was approaching a "slight curve" when it left the roadway. The photographic evidence clearly shows that the curve was not "slight" at all. (E.g., exhibit 32, attached to this brief at Tab C.) Second, they point out that the road had been seal coated a month or six weeks before the accident (Brief, 20), but fail to mention that the rocks used in the seal coat were too small to have jammed the steering in the manner which they alleged, and that in any event the road surface itself was clean (Stephens direct, 106; Johnson direct, 102).

The plaintiffs alleged that a rock was lofted up from the road and lodged in the steering mechanism of the truck, locking the steering. Plaintiffs' own expert described this scenario as "a highly unlikely situation." (E.g., Manning cross, 12.)[1] The evidence regarding plaintiffs' theory of causation, stated in the light most favorable to plaintiffs, is as follows:

The vehicle has a flexible joint ("coupling") connecting the steering box, which contains the gears, to the steering column. The flexible coupling is necessary to ensure that the gears will

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[1] Because of the dispute over who should pay for the transcript, it was completed in two phases. Unfortunately, the two phases are not consecutively numbered. Accordingly, we refer to the witness' name, portion of examination, and page number to assist the court in finding its way around duplicate page numbers.

not be laterally loaded, and thus bind, due to any slight misalignments of the column. At the flexible coupling, where the shaft from the steering box joins the column, the two segments are separated by a fibrous bushing, which helps to prevent mechanical noise and shock impulse from being transferred through the column to the steering wheel. Plaintiffs claimed that a rock lodged between the coupling and the end retainer nut on the case of the steering gear, preventing the driver from turning the steering wheel to the left (had he turned to the right, the alleged rock would have fallen out).

There was no dispute that, long before the truck left the roadway, the driver had locked the brakes and, thus, the wheels; all witnesses agreed there were continuous skid marks on and off the road. (Basye cross, 90-91.)[2] With the brakes locked, the truck could not steer regardless of whether the steering was jammed--it simply slid in a straight line in the path of its momentum. (Stephens cross, 57.) The question was whether the driver had tried to steer the vehicle before he applied the brakes and began to skid, because having locked the brakes, he deprived the tires of the ability to turn the vehicle, irrespective of steering angle.

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[2] At page 19 of their brief, plaintiffs say that Mr. Manning testified that they brakes did not lock when Wayne Nay applied them. Mr. Manning did not so testify, and plaintiffs' citation to Manning's testimony does not support their assertion.

At trial, all of plaintiffs' experts agreed that, if a rock had lodged between the flexible coupling and the end retainer nut and locked the steering, they would expect the turning and compression forces to leave a "witness mark" on the coupling or nut. (Stephens cross, 49-53; Manning cross, 11; Basye cross, 87.) Yet the experts also agreed that the expected witness mark was not present. (Manning cross, 11-12, 15-16, 23; Stephens cross, 53-55; Basye cross, 87.) Mr. Stephens' testimony that he saw no witness marks is particularly significant, because he was one of the plaintiffs' experts and was the first person to examine, photograph, and disassemble the parts. (Stephens cross, 49-53.)

The driver was a large man, 6' 3" tall, and, although plaintiffs' experts made no attempt to calculate the mechanical advantage in the steering system, the steering mechanism gave the driver a mechanical advantage at the point the rock allegedly occupied of about 15 to 1. (Confer direct, 213-14; see Manning cross, 20-21.) This means that one foot-pound of force exerted at the steering wheel translates to 15 pounds of force at the point where the rock allegedly lodged, more than enough to crush the rock or dislodge it. The average male can easily exert 200 foot-pounds of torque on the steering wheel (Riede direct, 191-92), which translates to 3000 pounds of force on the rock. When plaintiffs' experts manually inserted a rock in their candidate location, and allowed members of the jury to attempt to turn the steering wheel, the rock always broke or popped loose. (Manning direct, 25-26.) Mr.

Stephens had conducted out-of-court tests with the same results. (Stephens direct, 140.) Thus, there was no evidence that a rock could actually freeze the steering mechanism, even if there had been a witness mark evidencing that a rock was actually present in the mechanism, which there was not.

Similarly, there was no evidence that a rock of appropriate shape and hardness had been present on this well-travelled haul road, and no credible evidence of a mechanism or a path for the rock to get from the road up into the gear, or a force available to insert it into the space between the gear box and coupling. In fact, the evidence was that the drafts from the coal-hauling trucks (the primary purpose of this road is to allow coal haulage from the SUFCO mine; the road dead-ends there (Johnson direct, 99)) swept the road surface clean.

Finally, the court should note that the trial court had before it numerous items of physical evidence, including exemplars. It also participated with the jury in a view of a sister vehicle. (Tr. vol. 2, pp. 195-98.)

SUMMARY OF ARGUMENT

I. The court correctly directed the verdict for the defendant because the plaintiffs did not present substantial evidence that the accident was caused by a defect in the vehicle. Plaintiffs' experts testified to causes of the accident which even they described as remote possibilities, not reasonable probabilities.

A. The plaintiffs' burden was not just to provide any evidence, however incredible, that a defect might have caused the accident. Their burden was "'to show that the circumstances surrounding the accident were such as to justify a reasonable inference of probability, rather than a mere possibility, that the [alleged design defects] were responsible.'" Hersch v. United States, 719 F.2d 873, 878 (6th Cir. 1983) (quoting Perkins v. Trailco Mfg. and Sales Co., 613 S.W.2d 855, 857-58 (Ky. 1981) (editing by the court)). The scenario which plaintiffs' experts proposed was totally improbable: contrary to the physical evidence and, in some cases, to the laws of physics.

B. Plaintiffs first had to prove that a rock of appropriate size would have been present on the road. Accepting the presence of the rock on faith, they next had to show how the rock could get from the road into the steering coupling. They proposed that a tire picked a rock of relatively precise dimensions off the road and, after multiple ricochets, the rock passed through a small opening in a heavy rubber splash shield and inserted itself with precisely the correct amount of force into the steering mechanism of the truck. One "expert" even went so far as to opine that the rock flew over the engine from the passenger side of the car. The experts admitted, however, that they did not really know how the rock would get to the steering coupling, and that the mechanism they proposed was "highly unlikely" and would occur "very infrequently." They were willing to adopt this hypothesis because it

was not impossible and they could find no other defects in the vehicle. In so doing, they had to ignore the obvious lack of physical evidence to support the theory, and the overwhelming evidence that the accident was caused by driver inattentiveness.

C. The turning force the driver places on the steering wheel is multiplied by 15 times at the point where the rock allegedly inserted, yet the experts opined that the rock survived this force and did not break or fall out. However, plaintiffs' in-court demonstration of this hypothesis (which required the expert to carefully insert the rock into a specific area in the steering coupling) confirmed that the rock always breaks or falls out. With the exception of one totally uncontrolled test in an expert's driveway, all experts had the same experience.

D. The physical evidence also contravened the rock hypothesis. The experts agreed that the compression force on the rock would leave a witness mark on the coupling where the rock had been, yet no witness mark was ever found. Moreover, the hypothesis of no left-hand steering necessarily requires that the vehicle's tracks as it left the road ought to project back up the roadway. In fact, the tracks project sharply toward the shoulder of the road on what would have been the driver's right (see photographs (exhibits 36 and 37) at Tab E). This suggests that the driver inattentively drifted off the right hand side of the road, turned the truck toward the left (this is necessary to align it with the skid marks) and then locked the brakes. With the brakes locked, the

truck would not turn regardless of the steering input from the driver. Plaintiffs' experts admitted that they could not reconcile the physical evidence with their rock hypothesis.

E. This evidence was not "substantial evidence" by which a jury could have found a reasonable inference of probability that the accident was caused by a defect in the vehicle. It was pure speculation.

II. The trial court did not abuse its discretion in ruling that evidence of a recall of a different model vehicle for a different alleged defect was inadmissible. The court was familiar with the differences in design of the two vehicles, and correctly ruled that the evidence was irrelevant. The court also correctly exercised its discretion to exclude the evidence because any possible probative value the evidence may have had was outweighed by its unfairly prejudicial effect.

A. The threshold requirement for admission of recall evidence is that the products and defects involved in the recall are substantially the same as the products and defects at issue. Even then, the evidence should be excluded if the danger of unfair prejudice outweighs its probative value. Jordan v. General Motors Corp., 624 F. Supp. 72, 77 (E.D. La. 1985); Muniga v. General Motors Corp., 102 Mich. App. 755, 302 N.W.2d 565, 568 (1980).

B. The alleged problem in the recalled units was that a rock could lodge between the flexible coupling and the frame of the vehicle, resulting in a loss of steering. This could occur be-

cause the coupling was mounted inside the frame, with a clearance to the frame of only 1/4 inch. Allegedly, a cross-member of the recalled vehicles, which was below and directly in front of the coupling, could bottom out on gravel roads and scoop rocks into the area between the coupling and the frame.

C. In the truck at issue in this case, however, there is no cross member to scoop up rocks; plaintiffs' experts theorized that the only way for a rock to enter the coupling area is by multiple ricochets inside the wheelwell and through the heavy rubber splash shield. Even if a rock could breach those barriers, the clearance between the coupling and the frame on the truck is 1-1/4 inches, so the frame-to-coupling interference cannot occur. Plaintiffs' experts testified to interference between the coupling and the end retainer nut on the steering box, not between the coupling and the frame.

C. Plaintiffs argue that there was evidence of similarity. The evidence to which they point is the testimony of witnesses who said that the component parts of the steering are the same. The problem, however, was not the parts, but rather the proximity of those parts to the frame, combined with a specific mechanism for scooping rocks into the area. The trial court correctly ruled that the recalled cars:

> had an entirely different location and spatial relationship between the flexible coupling and the frame rail than the one involved in this case. Additionally the manner and method in which gravel or rocks could be introduced into the flexible coupling area involve the

scooping of gravel by a frame cross-member. The vehicle in question has no frame cross-member. (R. 291.)

III. Rule 11(e)(2) requires the appellant to obtain transcripts of "all evidence relevant to" a conclusion which the appellant intends to challenge. The trial court correctly applied this rule to require the appellants to order transcripts of the cross-examination of their own experts, and the testimony of other witnesses which bears upon the experts' conclusions.

A. In deciding whether the plaintiffs have made out a prima facie case, "the evidence must be viewed as a whole, including the status of the evidence after cross-examination." Oberg v. Sanders, 111 Utah 507, 184 P.2d 229, 233 (1947).

B. In reviewing a directed verdict or a judgment notwithstanding the verdict under the substantial evidence standard, the appellate court looks at the evidence as a whole, not just the evidence elicited by plaintiffs' counsel on direct examination. Plaintiffs ask the court to disregard undisputed evidence which is directly relevant to their assertions, simply because the evidence did not come out in direct examination of their witnesses. The court should not impair its understanding of the evidence on that basis.

ARGUMENT

POINT I

THE COURT'S ENTRY OF A DIRECTED VERDICT WAS CORRECT.

A. Standard of Review.

In reviewing a directed verdict, the court "must examine the evidence in the light most favorable to the losing party." Management Committee of Graystone Pines Homeowners Association v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982). A directed verdict or a judgment notwithstanding the verdict is appropriate in a case whenever the party against whom the motion is asserted has failed to offer substantial evidence in support of any element of its claim upon which it bears the burden of proof. Taylor v. Keith O'Brien, Inc., 537 P.2d 1022 (Utah 1975). In deciding whether the trial court acted correctly, the court must consider the status of the evidence after cross-examination:

> Does the evidence constitute a prima facie case of damage by fraudulent representations or deceit? In testing the sufficiency of the evidence on motion for nonsuit, the evidence must be viewed as a whole, including the status of the evidence after cross-examination.

Oberg v. Sanders, 111 Utah 507, 184 P.2d 229, 233 (1947).

Plaintiffs' burden was to prove by a preponderance of the evidence that the accident was caused by a defect in the vehicle. Utah Code Ann. § 78-15-6. The "defect" plaintiffs chose to assert was that a rock could be lofted up from the road, enter the wheel well, ricochet through a splash shield, drop into the space between

the coupling and the gear case, not break or fall out, and deprive the driver of steering control over the vehicle. In order to prevail, plaintiffs had to provide "substantial, competent evidence upon which a jury acting fairly and reasonably" could find that plaintiffs' postulate was more probable than not. See Dairyland Insurance Co. v. Holder, 641 P.2d 136, 138 (Utah 1982). They did not do so.

B. Plaintiffs Failed to Prove That a Defect in the Vehicle Caused the Accident.

Plaintiffs called three expert witnesses in support of their theory: David Stephens, Lindley Manning, and Charles Basye.

1. David Stephens.

Mr. Stephens described himself as "a consultant in the field of accident and safety." (Stephens direct, 102.) He was an insurance claims manager for 25 years, obtained a masters degree in "safety" and became a "consultant." (Id.) He described his "mechanical experience" as follows:

> I was a service station attendant when I was 15 years old. I've been turning nuts and bolts in some degree ever since. In the mid-'70's, I worked as a volunteer with a friend of mine who ran a board race car and I was his crew chief. We campaigned that car in California, Arizona, Utah and Colorado. I've done extensive work on my own personal cars, and I restore cars. (Id., 103.)

Mr. Stephens was the first expert witness to inspect the vehicle, about five days after the accident. (Id., 105.) He testified that he washed, examined, and photographed the steering coupling

at that time and saw no witness mark which would support the plaintiffs' theory. (Cross, 53.) He also testified that he saw no witness marks on the end retainer nut attached to the gear. (Id., 54, 55.) The following exchange is important because the plaintiffs did not retain the coupling for inspection by others:

> Q You mentioned that you were not looking for witness marks on the flexible coupling or the end retainer nut. Had there been something unusual about that, you would have considered it, would you not?
>
> A If it had been unusual, and I had also seen it, I probably--
>
> Q You're a trained investigator?
>
> A Yes.
>
> Q You did not know the cause of the accident?
>
> A Correct.
>
> Q You were looking for something in the steering?
>
> A Yes.
>
> Q And you had those parts right in your very hands?
>
> A Yes. I did.
>
> Q You cleaned them up?
>
> A Yes.
>
> Q And you disassembled them?
>
> A Right.
>
> Q And you photographed them?
>
> A Yes.
>
> Q And you adjusted your camera for the proper exposure?

A Yes.

Q And did you adjust your camera for the proper focus?

A Yes.

Q And those photographs were in good focus, weren't they?

A Yes. I'm proud of 'em.

Q I would think so.

And the photograph showed no witness marks?

A The photographs don't show anything that could show witness marks. They aren't of the components that would show. They're not the right angle to show witness marks if they had been taken. Ambiguous? I'm sorry, but I think I made my meaning.

. . . .

Q Had you noticed anything unusual while you were setting up for that very careful photography, you would have photographed that, would you not?

A I would have, yes.

Q And you saw nothing unusual?

A I saw nothing. (Recross, 64-66.)

Plaintiffs rely heavily on Stephens' testimony that his examination of the width of the tire tracks led him to conclude that the front wheels were not turned when the truck left the road. Even taken at face value, the testimony does not establish, or even tend to prove, a defect in the vehicle. The proof plaintiffs lacked was substantial evidence that their hypothesized mechanism for jamming the steering was plausible.

Stephens testimony regarding the tire tracks was based on two very subjective pieces of evidence: 1) Mr. Stephens' observation of the accident scene five days after the accident, where he observed that, on that day, weeds near the tire tracks did not appear to be bent over (Stephens direct, 135, 143-45);[3] and 2) pictures of the accident scene, which were subject to various interpretations (exhibits 13, 29, 81, 90, 96-102; Riede direct, 262-63, 270-74). (A copy of exhibit 29 is included at Tab D of the appendix so the court can see for itself the evidence upon which Mr. Stephens based his opinion.) In evaluating whether this testimony is meaningful, it is important to keep in mind that the vehicle traveled straight over the hill, so the back wheels traveled through the path of the front wheels.

On cross-examination Stephens conceded that the tire tracks found at the accident scene showed that the right front tire had gone off the pavement and onto the shoulder, and had then turned to the left back onto the pavement a considerable distance back from the curve. (Stephens cross, 58-60.) In fact, photographs show that the truck's angle of momentum is not in a straight line with the roadway, but rather is at a considerable angle originating from the right shoulder. (Stephens' dilemma is clearly apparent

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[3] Defendant's witness, Newell Knight, measured the tire tracks on the same day as Mr. Stephens. Mr. Knight testified that the tracks appeared to be seven to eight inches wide near the edge of the hill, but that they were wider back where the vehicle left the pavement. (Knight cross, 168; exhibit 36.) That is also apparent from exhibits 29 and 81.

in exhibits 36 and 37, copies attached at Tab E; the white tapes in the photos have been placed along the skid marks.) This evidence suggested that the driver had inattentively drifted off the right hand side of the road, begun (without interference from any rocks) a left turn back onto the pavement, found himself going too fast for the approaching curve, and locked the brakes. (Manning cross, 19; Riede direct, 258-60) Stephens admitted:

> Q When you traced out the path of the vehicle going backwards up towards the crest of the hill; you found it, the path, to run toward the right shoulder of the road, did you not?
>
> A Yes. I did.
>
> Q You could not explain that, could you?
>
> A I didn't explain it, no. I observed it and considered it, and wasn't able to find an answer. (Cross, 58.)

In other words, Stephens could not even reconcile his opinion with the physical evidence at the accident scene.

In their case in chief, plaintiffs did not attempt to qualify Mr. Stephens as an expert on anything other than accident reconstruction, yet in their brief plaintiffs look to him as an advocate of the stone interference theory. When asked on direct examination, "What is your opinion in regard to the stone interference theory?", Mr. Stephens responded simply, "Seems reasonable to me." (Stephens direct, 141.)[4]

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[4] On rebuttal, Stephens did get into the area of mechanical engineering. Stephens was plaintiffs' only rebuttal witness, for reasons which were apparent: No competent mechanical engineer

When asked if he had been able to duplicate the alleged jamming of the steering system, he replied that he had not:

> I've put, oh, more than a dozen, certainly, rocks in there and turned it, and tried to jam them between the ramp portions like in here and between the ramp and the notches in the ring gear. And in each case, I have broken the rock, or the rock has flipped out. I've never been able to get it so I couldn't possibly turn it. But I have gone through it many times. (Id., 140.)

Finally, at the conclusion of redirect examination, Mr. Stephens admitted that his extensive examination of the vehicle had not revealed any mechanical defect:

> In spite of the fact that I've not been able to identify any specific, or personally identified any specific mechanical failure or function in the vehicle which caused the accident; the evidence that I have reviewed convinces me that it was not a driver error problem. (Redirect, 162-63.)

2. Lindley Manning.

Mr. Manning is a professional witness. He admitted to having made about 150 trial appearances and given 500 depositions in the past three years. (Manning cross, 3, 6.) His claimed specialty is mechanical engineering. He admitted on cross that he would give an opinion in most any case involving a mechanical function, including ladders, snowmobiles, lawnmowers, washing machines, garden tools, punch presses, conveyor belts, elevators, and now, steering

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could espouse the theory plaintiffs were then espousing, which was that the alleged rock flew from the passenger side tire, over the engine, and into the flexible coupling. See discussion beginning at page 26 of this brief.

couplings. (Id., 4.) He also claims to be an auto accident reconstructionist. (Id., 5.)

Mr. Manning testified that he thought stone interference was the most likely cause of the accident, but also admitted that the probability of it happening was "highly unlikely." (Id., 12.) He testified that his opinion was based on the fact that others had postulated this defect and he could find no other defects (id., 12); however, he also testified that he would expect a witness mark on the parts (id., 11), that the parts had been disturbed when he saw them (id., 13), that the photographs by Mr. Stephens were inconclusive (redirect, 46), and that he had not bothered to closely examine the photographic negatives (recross, 40).

He also testified that he had no information on the mechanical advantage the steering system gave the driver and had made no effort to calculate it or its effect on the alleged rock or, consequently, on the alleged accident scenario. (Cross, 20-23.) He did not know what kind of tires were on the accident vehicle, but was nevertheless willing to say that they would pick up a rock of the necessary dimensions. (Recross, 36; redirect, 41-44.)

The steering coupling in question is located forward and above the center of the wheel (Manning cross, 24) and 8 to 10 inches inboard from the inside edge of tire. (Stephens cross, 43.) It is separated from the wheel well by an inner fender and heavy rubber protective skirt ("splash shield"). (Basye direct, 207-08.) Manning admitted that it is not possible for the tire to pick up

a rock and deposit it directly on the steering coupling. (Manning recross, 37.) If it is even possible at all, it could only occur after multiple ricochets. (Id., 37-38.)

Although Manning testified that it was possible for a rock to ricochet from the wheel well to the steering coupling, he was not aware that the Nay vehicle had the protective splash shield blocking the hypothesized path of the rock (Manning's opinion was based on examination of an older truck that did not contain the shield). (Cross, 24-28.) Manning simply speculated that these multiple ricochets must have occurred because he could find no evidence of any other defect (id., 12). The truth is, he presented no evidence of any defect at all.

3. Charles Basye.

Mr. Basye is an engineering professor from the University of Missouri who consults as an expert witness on the side. (Basye cross, 67-68.) He testified that the design was defective because of the remote possibility that a rock could bounce off the road into the steering coupling. "I can't tell you how frequently it would happen. It would be extremely infrequently. But it could happen." (Direct, 190.)

Basye was the only witness to testify that he could cause the steering to jam by manually placing a rock between the end retainer nut and the flexible coupling. (Direct, 189.) The experiment, however, was conducted in Mr. Basye's driveway, with a stationary vehicle. (Direct, 185, 188-190.) He testified on cross-examina-

tion that he had no idea what mechanical advantage the system afforded the driver or how much turning force was applied in the test. (Cross 84-85.) He did not instruct the person in the truck how hard to turn the steering wheel and has no idea what effort was made. (Id., 85.) He did not instrument the truck, although it would have been easy to do. (Id., 82-83.) He did not even know the hardness of the rock used or whether rocks in his driveway in Missouri are comparable in hardness to rocks that might have been in the area of the accident. (Id. 89.) In other words, the "experiment" was totally uncontrolled and the hypothesis it supposedly "proved" was purely speculative.

Basye testified that, in his opinion, the accident was caused by a foreign object becoming lodged in the area between the flexible coupling and the end retainer nut. (Direct, 218.) Even on direct examination, the speculative nature of the opinion was apparent:

> Q Okay. Now let me ask you, well, is there one particular [sic] for a rock to leave the tire and get up into this area--is there one particular direction that you would believe it would have to travel to get to that location?
>
> A I cannot be that precise, Mr. Hansen, as to how it got there. If it was indeed a rock thrown by the wheel, I can't say precisely how many times it rebounded inside the wheel well or something else in there. I cannot say, no, sir. (Direct, 217-18.)

This speculation became even more apparent when the basis for the opinion was probed on cross-examination:

Q You've done no testing at all on how a rock would get from the road to the gear?

A You mean have I--

Q Run it down a graveled road or anything like that?

A No. I really haven't.

Q You've done no qualitative analysis of vectors and so forth as you used and so forth to see how many ricochets it would take and how you would get it from this point to this point?

A No. (Cross, 86-87.)

Q How many ricochets would it take to get a rock from the road surface to the coupling?

A I can't answer that, Mr. Clegg.

Q How many directions does it have to make if it flipped up in the same plane as the tire; how many rotations does it make to thread through that hole in the splash shield and into that coupling?

A I don't know.

Q Can it go directly from the hole in the coupling into the--or directly from the hole in the splash shield into the coupling?

A It would happen on extremely infrequently, as I said earlier today, as to how many ricochets precisely, that is something I can't answer. I don't know.

Q I'm asking you though, can it come in a direct line through the splash shield into the coupling--

A Yes.

Q --without ricocheting inside of the frame area?

A What are you asking me?

Q I'm asking if it can come directly in a straight line?

A Yes.

Q From the hole you're talking about into the coupling?

A Yes.

Q And where is it going to hit in the--

A I don't know. I said I think and I think this is the most probable cause of this accident, a foreign object, where in the geometry of the clock, it would have lodged, I don't know. (Cross, 89-90.)

Finally, Mr. Basye testified that he would expect to find some witness mark on the parts if his scenario were correct. (Cross, 87.) He did not know what the mark might look like, had done no testing to try to find out (id.), and did not even know the hardness of the materials involved (id. 89).

4. Summary.

The real issue in this case is how far the court must allow an expert witness to stretch the bounds of reality, credibility, and his own experience before the court can simply reject the plaintiffs' hypothesis as unsupported by substantial evidence. In this case, Mr. Stephens admitted he could find no defect but was nevertheless willing to opine that driver error was not the cause of the accident. That is not "substantial" evidence. Mr. Manning opined that a rock impinged the steering components because he could find no evidence of any other defect, not because he saw evidence to support that theory. Mr. Basye's opinion was completely

speculative, and even he admitted that the scenario he postulated was highly unlikely.

Those opinions were nothing but speculation. They epitomize the problem of "purchased" testimony. The physical evidence arrayed against them was overwhelming. No expert could duplicate the condition, except through manually inserting a carefully chosen rock between two steering components; even then, it could not be made to stay there. None of the physical evidence the experts expected to find, and particularly the witness mark which such an event would obviously leave on the parts, was present. Those "experts" who knew the physical orientation of the parts (Manning did not) speculated to the most improbable of scenarios: Basye was willing to suppose a rock coming from the tread of the left front tire, with multiple ricochets culminating in the rock passing through a hole smaller than a person's fist and landing on the coupling in precisely the right place and with precisely the right force.

Perhaps Mr. Stephens' rebuttal testimony illustrates the problem best. He testified that a rock "tiddley-winked" from the inside edge of the passenger side front tire and somehow found its way 1) out of the wheel well; 2) under or through the right splash shield; 3) over or under the right frame rail; 4) into the engine compartment; 5) over the engine; 6) past the left frame rail; 7) into the critical space between the coupling and end retainer nut; 8) lodged tightly there and did not break or fall out; 9) and

interfered with steering. (Stephens rebuttal, cross, 263-266.) Such a stone's forward motion through all this would allow it to keep up with the vehicle's speed of 50 mph, despite no forward moving forces. All this had to happen within a quarter mile of the accident site (exhibit 29; Riede direct, 248), where the truck has just successfully and uneventfully negotiated a left curve, proving no interference at that point. (Manning cross, 12-13; Stephens direct, 106.) All this from an "expert" with no formal training in engineering or physics; in fact, his highest course in mathematics was high school algebra. (Stephens rebuttal, cross, 263.) Is the trial judge obliged to disregard all principles of physics and common sense when a person is willing to proclaim himself worthy of opinion?

Judge Moffat was correct in deciding that this evidence was not substantial and that a jury acting reasonably could not have believed it. Plaintiffs' burden was more than just to show a hypothetical possibility: Their burden was "'to show that the circumstances surrounding the accident were such as to justify a reasonable inference of probability, rather than a mere possibility, that the [alleged design defects] were responsible.'" Hersch v. United States, 719 F.2d 873, 878 (6th Cir. 1983) (quoting Perkins v. Trailco Mfg. and Sales Co., 613 S.W.2d 855, 857-58 (Ky. 1981) (editing by the court)). As the Fourth Circuit has held:

> Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the

> necessary inference is so tenuous that it rests merely upon speculation and conjecture.

Ford Motor Co. v. McDavid, 259 F.2d 261, 266 (4th Cir.), cert. denied, 358 U.S. 908 (1958).

Plaintiffs were required to provide substantial evidence from which the jury could conclude that each step in their hypothesis was more probable than not. Their "experts" made naked assertions, unsupported by any testing or any physical evidence, that the accident was caused by an alleged "defect" because they could find no other defects. If that is "substantial" evidence, then there is no case which should not go to the jury because there is no case in which a suitable "expert" cannot be hired.

C. The Inability of the Jury to Agree Is Irrelevant to the Correctness of the Court's Entry of a Directed Verdict.

Plaintiffs argue that the fact that four jurors apparently believed plaintiffs' hypothesis proves that the hypothesis was supported by substantial evidence. They carry this argument one step further, asserting (incorrectly) that the court initially denied the directed verdict motion at the conclusion of plaintiffs' case in chief (he took it under advisement (R. 416)) and that the asserted denial precludes the court from later holding that substantial evidence was not presented.

Plaintiffs' position ignores fundamental provisions of the rules of civil procedure. If the fact that some members of the jury agreed with the plaintiffs were sufficient basis for resisting

a directed verdict, there could never be a judgment notwithstanding the verdict. Similarly, when a directed verdict motion is initially denied, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Rule 50(b), U.R.C.P. The final sentence of Rule 50(b) is directly on point:

> If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

See Graham v. Intermountain Electric, Inc., 487 P.2d 607, 608 (Colo. App. 1971) (directed verdict proper under Rule 50(b) when jury is unable to reach agreement); Hall v. Container Corporation of America, 189 So.2d 211, 212 (Fl. App. 1966) (upholding directed verdict first denied and then granted after jury announced it could not arrive at a verdict).

POINT II

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE RECALL UNDER RULE 403 BECAUSE THE DESIGN INVOLVED WAS NOT SUBSTANTIALLY SIMILAR TO THE ACCIDENT VEHICLE.

A. Standard of Review.

The admissibility of evidence is a question of law committed to the sound discretion of the trial court. Rule 104(a), Utah Rules of Evidence. The court's ruling may be reversed only if that discretion was abused, State v. Bartley, 784 P.2d 1231, 1237 (Utah App. 1989), and then only if admission of the evidence would have

had a substantial likelihood of bringing about a different result. Hill v. Hartog, 658 P.2d 1206, 1208 (Utah 1983).

B. The Trial Court Did Not Abuse its Discretion in Finding that the Design Involved in the Recall Was Not Substantially Similar to the Design of the Accident Vehicle.

The trial court concluded that a 1973 recall of passenger cars did not involve a substantially similar design to that of the pick-up truck involved in this accident. The court therefore ruled that the evidence was irrelevant; and, applying Rule 403, Utah Rules of Evidence, that even if relevant its potential prejudicial effect outweighed its probative value. (R. 290-92.) Both rulings were correct and either is dispositive. (Plaintiffs did not include a copy of the court's Minute Entry in their brief, so defendant has included one in this brief at Tab F.)

The threshold requirement for admission of recall evidence is that the products and defects involved in the recall are substantially the same as the products and defects at issue. Jordan v. General Motors Corp., 624 F. Supp. 72, 77 (E.D. La. 1985); Muniga v. General Motors Corp., 102 Mich. App. 755, 302 N.W.2d 565, 568 (1980). Even then, the evidence may be excluded if the danger of unfair prejudice outweighs its probative value. Id.[5]

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[5] Courts have also held that a manufacturer should not be penalized for obeying the law and instituting a recall, for the same reason that subsequent remedial measures are inadmissible under Rule 407, U.R.E. Vockie v. General Motors Corp., 66 F.R.D. 57, 61 (E.D. Pa.), aff'd without opinion, 523 F.2d 1052 (3rd Cir. 1975); Landry v. Adam, 282 So.2d 590, 596 (La. App. 1973). Judge

The recall involved 1971 and 1972 "B" cars (Caprice, Impala, etc.). The claim was that the clearance between the steering coupling and the frame of the vehicle was too close. This allegedly could allow rocks to lodge between the coupling and the frame, and jam the steering. (See plaintiffs' brief, p. 25.) The trial court correctly ruled that the recalled cars

> had an entirely different location and spatial relationship between the flexible coupling and the frame rail than the one involved in this case. Additionally the manner and method in which gravel or rocks could be introduced into the flexible coupling area involve the scooping of gravel by a frame cross-member. The vehicle in question has no frame cross-member. (R. 291.)

The court's ruling was based on evidence that the design of the B cars differs in several significant respects from that of the pickup truck in question in this case:

1. The steering coupling in the truck is about 1-1/4" away from the frame rail (R. 186; Confer depo., vol. II, p. 15; Confer redirect, 242-243), whereas in the B cars the coupling is mounted inside the frame rail, and the clearance is 1/4" to 3/8" (R. 185). The alleged problem which the recall was designed to fix, rocks

---

Moffat adopted this view as an alternative to the views advocated in the text:

> The defendant herein should not be subjected to the prejudice likely to be attached to the information regarding the 1973 recall simply because it was being somewhat cautious in its approach to the alleged problem when in fact the 1973 cars involved had an entirely different location and spatial relationship between the flexible coupling and the frame rail . . . . (R. 291.)

lodging in the 1/4 inch space between the frame and the coupling, cannot occur because that space in the truck is so much greater. (R. 185.)

2. The recall did not simply involve the proximity of the coupling and the frame. It also involved the alleged ability of a frame cross-member to bottom out on the road and scoop rocks directly into the coupling/frame area. That cross-member was close to the road and just ahead of the gear and coupling in the B car. (R. 185.) The truck does not have the ability to scoop rocks from the road because it does not have the necessary cross-member, and the steering coupling on the truck is several inches higher off the road than the one in the B car (Confer depo., vol. II, pp. 40, 75). General Motors' notification to the NHTSA (which is Exhibit C to plaintiffs' brief but does not appear to be part of the record in the court below) clearly describes the mechanism by which the frame allegedly scooped rocks into the coupling area and its importance to the decision to recall:

> When these cars are driven on unpaved road surfaces, particularly roads which are heavily graveled and which are extremely wavy, rutted or filled with chuck holes, at speeds which cause the car to pitch excessively, the front crossmember may scoop up loose stones or gravel from the roadway. These stones may be thrown up into the engine compartment. The possibility exists that one of these stones may lodge between the steering coupling and the frame and cause increased steering effort or interference with steering control of the car when the steering wheel is turned to the left.

3. Plaintiffs' claim in the case at bar is entirely different. Plaintiffs' claim here is not that a rock became lodged be-

tween the frame and the coupling, but rather that the rock became lodged between the flexible coupling and the end retainer nut on the upper rear of the steering gear box, not between the coupling and the frame.[6] (R. 265; Basye direct, 218-19.)

Plaintiffs rely on the affidavit of Charles Basye that the "Saginaw steering system used in the 1986 GMC High Sierra pickup truck . . . was mechanically and functionally essentially equivalent to the steering system used in the [B car]." (R. 265.) Mr. Basye's testimony is irrelevant: The steering column and gearcase may be the same and perform the same steering function, but they are installed in entirely different positions in the vehicles, and the vehicles' ability to place rocks into the area of the coupling is different. It was these last reasons that resulted in the recall.

Plaintiffs also cite Mr. Confer's deposition testimony that "[i]f you want to relate now to the steering gear, the coupling, there's no difference between the B car and the truck, they're the same." (Plaintiffs' brief, p. 34.) Plaintiffs' use of this testimony is misleading. Mr. Confer carefully qualified his testimony,

---

[6] In their brief, plaintiffs somewhat disingenuously assert that their claim is that "a stone was scooped into the engine compartment." (Brief, p. 26.) In fact, their claim is that a tire flipped a stone off the road and, through a series of totally improbable ricochets and despite the presence of intermediate obstructions, the stone somehow reached and lodged between the flexible coupling and the end retainer nut. (Manning recross, 37.)

stating that "the steering gear, the coupling" are the same. In other words, the parts are the same. The critical issue, however, which Mr. Confer made abundantly clear in his deposition (and which was clear to Judge Moffat as well (R. 291)), is that the installation and orientation of the parts in the truck and the B car are totally different. The trial court did not abuse its discretion in this regard, and its ruling should be affirmed.

C. Lowe v. General Motors Involved an Entirely Different Claim from the Case at Bar.

On appeal, for the first time, plaintiffs place heavy reliance on the Fifth Circuit case of Lowe v. General Motors Corp., 624 F.2d 1373 (5th Cir. 1980). Plaintiffs erroneously assert that the claim in Lowe was the same as the claim in the case at bar. Plaintiffs have misunderstood the facts and the issue in Lowe.

It requires a careful reading of the case to discern the difference between Lowe and the case at bar. In Lowe, the plaintiffs' decedent was driving a recalled B car. The plaintiffs' expert testified that a rock lodged in the small space between the coupling and the frame, which caused the steering to jam. He further testified that, as a result of resulting fatigue and stress caused by the interfering stone, a tooth of the Pitman shaft fractured, which is what ultimately caused the vehicle to veer off the road. 624 F.2d at 1376. The stone did not prevent the column from turning except when it was in contact with the frame.

The issue in Lowe was not evidentiary. The issue was whether the Motor Vehicle Safety Act of 1966 created a private cause of action. The plaintiffs had argued that GM's alleged violation of the Act (by having insufficient repair parts available to dealers and not adequately explaining the danger to owners) was negligence per se. The trial court rejected that claim, holding that "allowing evidence of any violation by GM of the MVSA to establish negligence per se was the equivalent of allowing a direct cause of action under the MVSA, contravening the holding of Cort v. Ash, 422 U.S. 66 (1975)." 624 F.2d at 1376. The Circuit's ruling was that:

> [T]here was sufficient evidence submitted for the trial court to allow the jury to determine whether GM's recall campaign gave inadequate warning of the danger to 1971 Chevrolet Impala owners and whether this was a proximate cause of the deaths . . . .

Id. at 1381. No such claim was, or could have been, asserted in the case at bar.

In a lengthy footnote (Brief, p. 28 n.3), plaintiffs go outside the record to charge that the Lowe case was similar to this case and that GM concealed the existence of that case in discovery responses. It is apparent enough from the foregoing discussion that the case involved an entirely different claim than the case at bar, and GM's discovery responses clearly disclosed to plaintiffs that they were limited to claims similar to the plaintiffs' claim here--that a rock lodged between the flexible coupling and the steering gear assembly (GM did not simply draw a line between

cars and trucks). Plaintiffs did not challenge that limitation in the trial court.

However, GM feels a need to respond more completely to the charge. Accordingly, GM has also gone outside the record to obtain the affidavit of Eugene D. Martenson, one of the lawyers who represented GM in the Lowe case. The affidavit is attached at Tab G of this brief. Mr. Martenson explains that the issue in the case was not whether the recall was relevant, but whether the recall statute gave rise to a private cause of action (¶ 6). He also explains in more detail the fact that Lowe involved a claim of interference between the coupling and frame, not the coupling and steering gear assembly:

> The investigating officer and wrecker driver testified that they found a rock wedged and held fast in the coupling. The plaintiff experts opined that this rock rotated with the coupling and caused stone interference with the frame as described in the "B-Car" recall.
>
> It was plaintiffs' theory that the rock precluded proper rotation of the coupling and, hence, the steering column, resulting in fatigue and eventual breakage of an internal gear within the steering gear box.
>
> . . . .
>
> When the reported decision (624 F.2d 1373) refers to a stone "inside the steering coupling" (p. 1376), it refers to a stone allegedly trapped within the rotating steering coupling with part of this stone allegedly protruding and contacting the frame of the plaintiffs' vehicle.

(Affidavit, ¶¶ 4, 5, 8.) The claim is clearly different from the claim asserted by the plaintiffs in the case at bar.

D. Summary.

Admissibility of evidence is committed to the trial court's discretion. The trial court correctly ruled that there was insufficient similarity between the recall and the claim in this case to make the recall evidence relevant at all. The trial court's alternative ruling, that the unfair prejudice the evidence might work against GM outweighed any slight probative value the evidence may have had, was also correct. The rulings should be affirmed.

POINT III

THE COURT CORRECTLY ORDERED PLAINTIFFS TO PAY FOR THE TRANSCRIPT OF ALL EVIDENCE RELEVANT TO THE ISSUES THEY RAISE ON APPEAL.

A. Standard of Review.

There is no Utah law establishing the standard of review for this issue, but General Motors believes that the trial court is in the best position to evaluate the content and importance of trial evidence, and thus that the standard of review should be abuse of discretion.

B. The Court's Ruling Was Correct.

Rule 11(e)(2), Utah Rules of Appellate Procedure, provides:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

The rule does not say that plaintiffs must provide all evidence "supporting" their theory; rather, it requires them to

provide all evidence "relevant" to their theory. Accordingly, the Utah Court of Appeals has held:

> In essence, Rule 11 directs counsel to provide this court with all evidence relevant to the issues raised on appeal.

Sampson v. Richins, 770 P.2d 998, 1002 (Utah App. 1989).

Plaintiffs' docketing statement listed the following as an issue on appeal:

> Did the trial court err in granting defendant's Motion for Directed Verdict on the issue of negligence in light of plaintiffs' weighty expert witness testimony?

In ordering the transcripts of that "weighty" expert testimony, plaintiffs ordered only the direct and redirect examination of those experts transcribed, and failed to order the transcripts of cross-examination or of other "weighty" evidence which supported General Motors. The rule, however, requires a transcript of "all evidence relevant to" the court's conclusion on the issue, and clearly contemplates that cross examination and other evidence will be transcribed.

Defendant also designated for transcription the testimony of Chester Johnson, Newell Knight, Jerry Confer, and Pete Riede. These individuals all gave expert testimony relevant to the cause of the accident, which is clearly relevant to the issue plaintiffs raise. Under Rule 11(e)(2), plaintiffs were required to order and pay for transcripts of their testimony as well.

Plaintiffs misstate the standard the appellate court will apply in reviewing the directed verdict in this case. They say

the standard is whether, looking only at evidence elicited by the plaintiffs' attorney, and disregarding everything else, any evidence at all exists that might have supported a verdict for plaintiffs. That proposed standard is incorrect. The correct standard is whether the evidence as a whole is substantial enough to permit a jury, acting reasonably, to find for the plaintiffs. Management Committee of Graystone Pines Homeowners Association v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982); Taylor v. Keith O'Brien, Inc., 537 P.2d 1022 (Utah 1975). This standard differs from the standard as stated by plaintiffs in that it allows the court to consider all of the evidence, not just the evidence elicited by plaintiffs' lawyer. That is why a motion for directed verdict must be renewed at the close of all the evidence to preserve the ability to move for a judgment notwithstanding the verdict.

This is illustrated by an example from the trial of this case. Mr. Manning testified, in direct examination by plaintiffs' counsel, to a scenario in which a rock could be lofted up from the road, pass from the wheel well to the engine compartment, and lodge in the steering. He based this opinion on studies of a 1979 model year pickup truck in a St. Louis case. However, in the cross-examination of Mr. Basye, another of plaintiffs' experts, and in the direct examination of Mr. Riede, an employee of General Motors (Riede direct, 183), it was brought out that the model of truck which plaintiffs' decedent was driving had a heavy rubber splash

shield between the wheel well and the engine compartment, which prevents the scenario which Mr. Manning speculated could occur.

Plaintiffs want this court to consider Mr. Manning's testimony without the benefit of the undisputed facts brought out in the cross-examination of Mr. Basye and in the examination of Mr. Riede, which make Mr. Manning's hypothesis totally impossible. They cannot do that. That is the reason the Taylor case speaks in terms of the evidence, not just plaintiffs' direct evidence. It is also the reason the Supreme Court held in Oberg v. Sanders, 111 Utah 507, 184 P.2d 229 (1947), that "the evidence must be viewed as a whole, including the status of the evidence after cross-examination."

Plaintiffs chose to raise these issues on appeal. The rules require them, not the defendant, to provide the appellate court with all evidence bearing upon the factual conclusions which they have placed in issue.

CONCLUSION

Defendant requests that this court affirm the decision of the trial court.

DATED this 27 day of August, 1991.

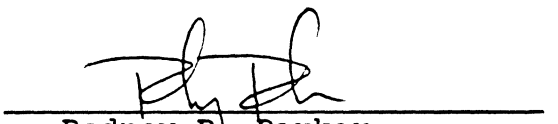
SNOW, CHRISTENSEN & MARTINEAU

By _____
Rodney R. Parker
Attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that four copies of the foregoing Brief of Appellee were served by first class mail on August 27, 1991, as follows:

Stephen G. Morgan
MORGAN & HANSEN
Kearns Building, Eighth Floor
136 South Main
Salt Lake City, Utah 84101



Rodney R. Parker

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

LEEANN NAY, et al.	:	MINUTE ENTRY
Plaintiff,	:	Case No. 880906114 PI
vs.	:	
GENERAL MOTORS CORPORATION, et al,	:	
Defendants.	:	

The Court having considered the various correspondence from Counsel regarding the Order heretofore signed on April 15, 1991 entitled "Order Granting New Trial and Directed Verdict" as prepared by Counsel for the plaintiffs and being fully advised in the premises now makes this its:

MINUTE ENTRY

It was the Courts intention at the time of the hearing on the Motion for a New Trial and the defendants', then pending, Motion for Directed Verdict to do the following in this order.

1. Set aside the verdict as being improper by reason of an insufficient number of jurors being able to arrive at a verdict.

2. Grant and enter the defendants' Motion for a Directed Verdict.

3. Deny the plaintiffs' Motion for New Trial.

Counsel for the defendants will prepare an appropriate Order and Directed Verdict.

DATED this 3rd day of May, 1991.

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

Tab B

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LEEANN NAY, individually and as personal representative for MATTHEW AND MERISSA NAY, the heirs of ROBERT NAY; and VIRGINIA NAY, individually and as personal representatives for CONNIE WHEELER, CAROLYN GALLEGHER, JOAN NAY and JALYNN NAY, the heirs of WAYNE NAY,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, GMC TRUCK DIVISION AND RON GREENE CHEVROLET PONTIAC GMC, INC.,

Defendants.

AMENDED ORDER ON POST-TRIAL MOTIONS AND DIRECTED VERDICT

Civil No. C 88-6114

Judge Richard H. Moffat

It having been called to the Court's attention that counsel for the parties disagree on the meaning of the Order entered April 15, 1991 and a review of that Order disclosing some ambiguity, the Court hereby makes and enters the following Amended Order which supersedes the earlier one. Inasmuch as the defendant dealer was dismissed from this cause by stipulation of

the parties, these rulings affect only plaintiffs and General Motors Corporation.

It is hereby ORDERED:

1. The jury verdict heretofore accepted is now rejected as defective.

2. Defendants' motion for directed verdict in their favor and against the plaintiffs, no cause of action, is granted.

3. Plaintiffs' motion for new trial is denied.

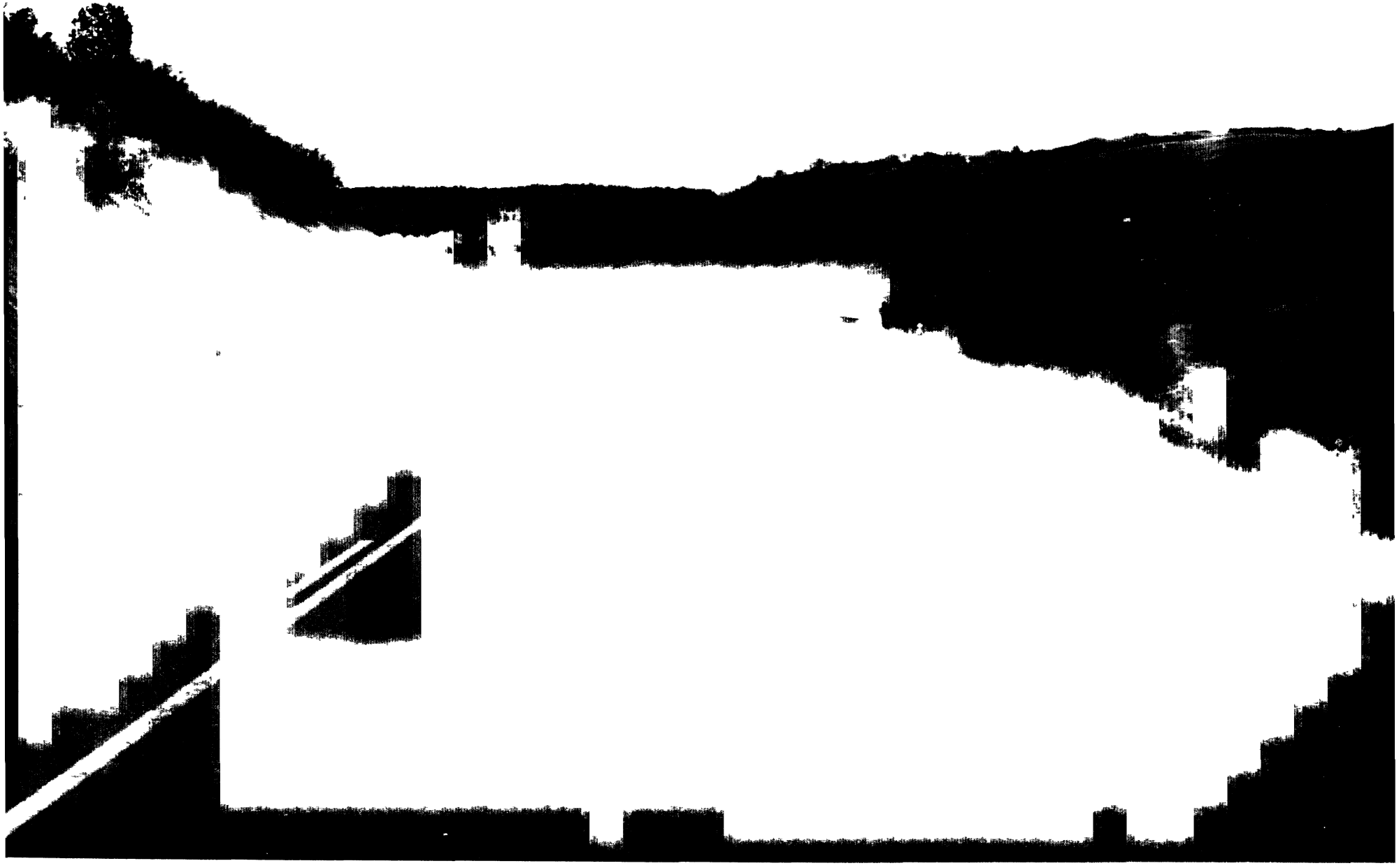
DATED this 23rd day of May, 1991.

BY THE COURT:

Richard H. Moffat
District Judge

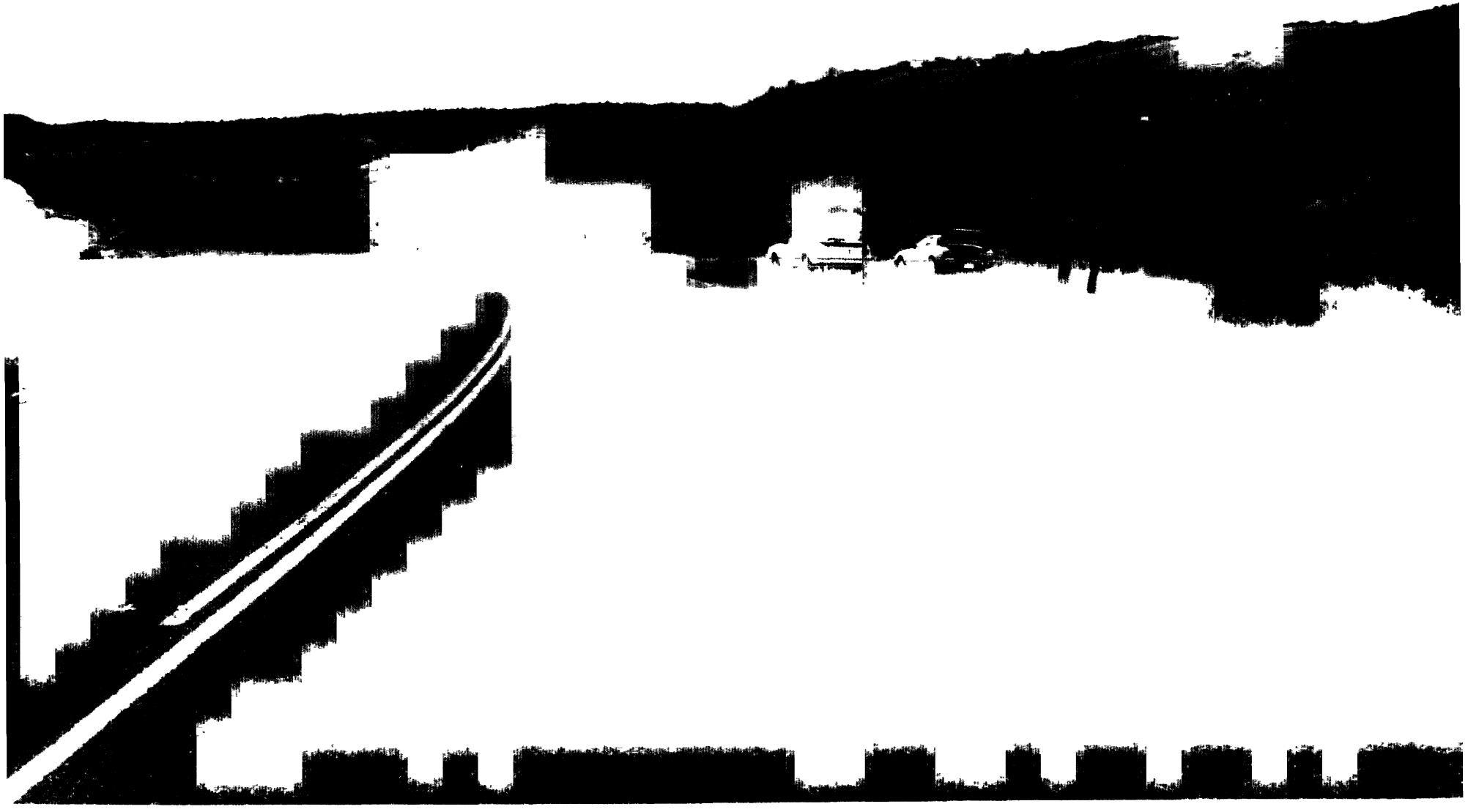
06\HJC\04613.724\AMENDED.ORD

Tab C



Tab D

Tab E



Tab F

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEEANN NAY, et al,	:	MINUTE ENTRY
Plaintiffs,	:	CASE NO. C-88-6114
vs.	:	
GENERAL MOTORS CORPORATION, GMC TRUCK DIVISION	:	
Defendants.	:	

The Court having considered the Motion in Limine filed on behalf of the defendant, General Motors Corporation, the Memorandum in Support thereof, the Memorandum in Opposition thereto, all Affidavits filed herein relating to said Motions and the total two volume depostion of Gerald Confer, and having heard oral argument and now being fully advised in the premises makes and enters this its:

MINUTE ENTRY

The defendant's Motion is granted as to both the question of the 1970, 1971, 1972 or 1973 vehicle year recall, and as to the fact that since 1988 certain General Motors vehicles have had a shield on the flexible coupling. The basis for said ruling is inter alia, the Courts finding that the physical location, and distance and spacing of the flexible coupling from the frame rail or any other fixed object which could cause a stone

interference is entirely different and dissimilar from the reason for the early 1970's recall. The Court is of the further opinion that given the understanding of the public as to the nature and mechanism of how recalls are instituted, a jury could well believe that simply because the 1970 recall was done, there was in fact a problem that necessitated a recall. In actual fact that recall was voluntarily done by General Motors after only two claims of stone interference which may in fact may not have occured. The defendant herein should not be subjected to the prejudice likely to be attached to the information regarding the 1973 recall simply because it was being somewhat cautious in its approach to the alleged problem when in fact the 1973 cars involved had an entirely different location and spatial relationship between the flexible coupling and the frame rail than the one involved in this case. Additionally the manner and method in which gravel or rocks could be introduced into the flexible coupling area involve the scooping of gravel by a frame cross-member. The vehicle in question has no frame cross-member. For these and for the other

reasons as set forth in the defendant's Memorandum, evidence of such recall will not be introduceable at the time of trial.

As to the fact that some General Motors vehicles currently carry a three hundred and sixty degree circular shield around the flexible coupling, that likewise is not introduceable at the time of trial. It is clear that the reason that coupling has that protective device is because since 1988 in certain of the company's cars the steering gear box and flexible coupling to it were relocated, and were the same design and type as used in the automobiles. As they carried a shield in the automobiles the shield has simply been carried over into this design, and would have no relevance or bearing upon whether or not the vehicle in question should have had a shield. In fact prejudice again could result from that inference being improperly drawn by the jury, and that shouldn't be allowed where the post-1988 location and shielding is not by reason of an attempt to improve or change the situation existing in the steering gear box and flexible coupling as it existed in the vehicle involved in this case.

Tab G

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IN THE UTAH SUPREME COURT

LEEANN NAY, individually and as personal representative for MATTHEW AND MERISSA NAY, the heirs of ROBERT NAY; and VIRGINIA NAY, individually and as personal representatives for CONNIE WHEELER, CAROLYN GALLEGHER, JOAN NAY and JALYNN NAY, the heirs of WAYNE NAY,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, GMC TRUCK DIVISION AND RON GREENE CHEVROLET PONTIAC GMC, INC.,

Defendants.

Appeal No. 910244

AFFIDAVIT OF EUGENE D. MARTENSON

STATE OF ALABAMA)
: ss.
COUNTY OF JEFFERSON)

Eugene D. Martenson being first duly sworn, deposes and says:

1. I am a member in good standing of the Alabama Bar and have personal knowledge of facts herein set forth.

2. I was one of counsel for General Motors Corporation in the trial, retrial and appeal of those consolidated matters entitled Lowe v. General Motors Corporation and Fulford v. General Motors Corporation and am fully familiar with the facts and theories therein put forth.

3. The vehicle involved in those cases was a 1971 Model Chevrolet Impala which was subject to the General Motors "B-Car" recall concerning possible stone interference between flexible coupling and left frame member.

4. That was the claim presented by plaintiffs' counsel and experts. The investigating officer and wrecker driver testified that they found a rock wedged and held fast in the coupling. The plaintiff experts opined that this rock rotated with the coupling and caused stone interference with the frame as described in the "B-Car" recall.

5. It was plaintiffs' theory that the rock precluded proper rotation of the coupling and, hence, the steering column, resulting in fatigue and eventual breakage of an internal gear within the steering gear box.

6. Thus, the claims in Fulford and Lowe involved substantially the same accident scenario hazard as was addressed by the recall. One of the legal issues was whether the federal recall statutes and regulations gave rise to a private cause of action, not whether the recall was relevant.

7. I have reviewed plainitffs' brief on appeal in the case of Nay v. General Motors, Appeal #910244, and understand plaintiffs allege a stone became lodged between the steering coupling and the gear case. This is not the same theory or claim that was presented in the Alabama cases above described. Those cases involved a claim of rock interference between coupling and frame as described in the recall, not between coupling and gear case.

8. When the reported decision (624 F.2d 1373) refers to a stone "inside the steering coupling" (p. 1376), it refers to a stone allegedly trapped within the rotating steering coupling with part of this stone allegedly protruding and contacting the frame of the plaintiffs' vehicle.

9. The attached diagram shows, in ink, the position the stone allegedly occupied in the Alabama cases.

Further affiant sayeth naught.

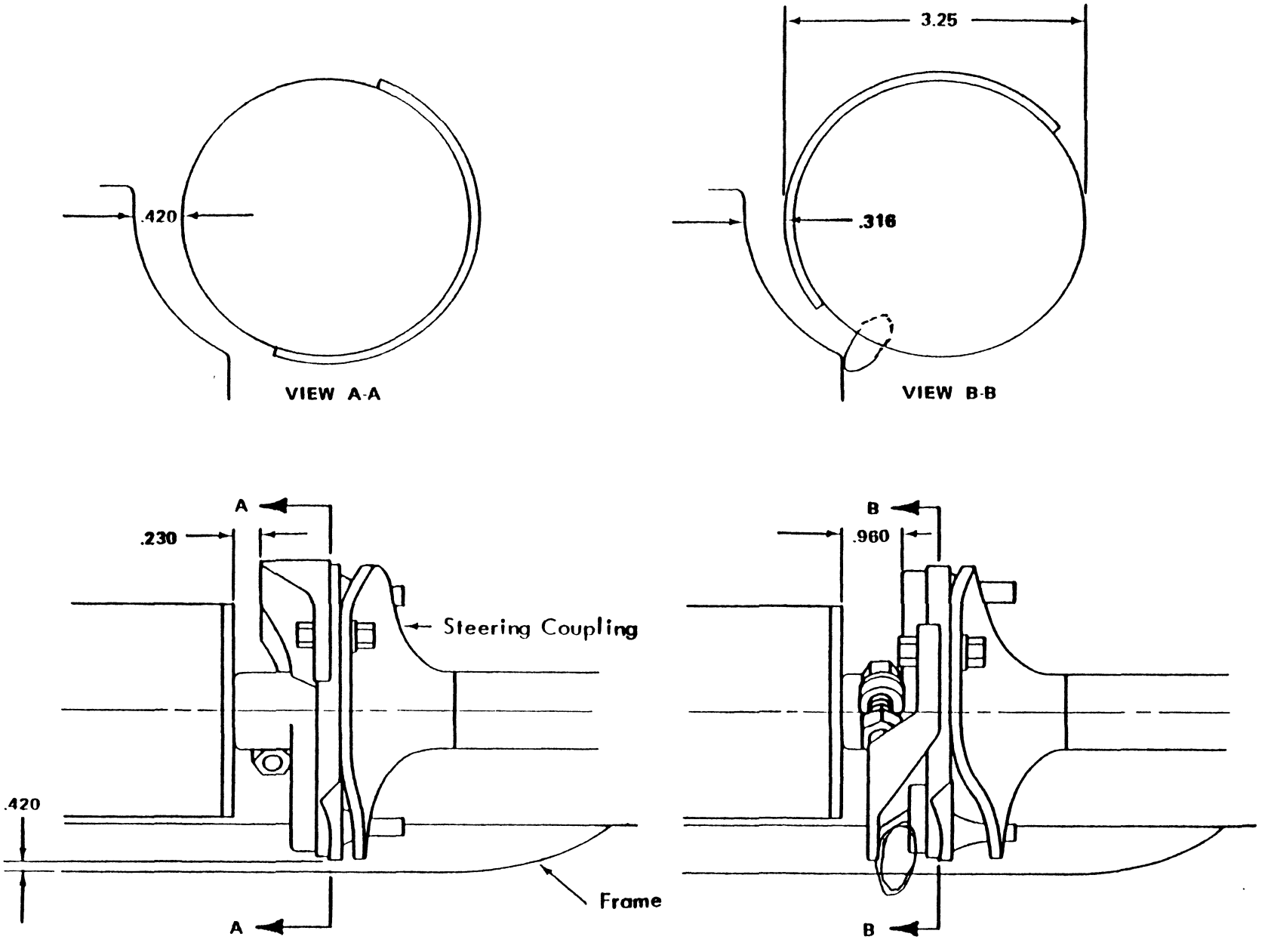
Eugene D. Martenson

SUBSCRIBED AND SWORN to before me this 5th day of August, 1991.

NOTARY PUBLIC
Residing In: Jefferson County, Alabama

MY COMMISSION EXPIRES:

3-31-94



SKETCH No. 3

Steering coupling and frame on 1971 Chevrolet Impala.